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No. 92-8275

in the Supreme Court of the United States

February Term, 1994

STANLEY E. ADAMS
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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QUESTIONS PRESENTED

I.

WHETHER THE PLAIN LANGUAGE OF RULE 32 MANDATES THAT WRITTEN OBJECTIONS MADE BY THE DEFENDANT PRIOR TO SENTENCING TRIGGER THE DISTRICT COURT'S FINDING REQUIREMENTS UNDER RULE 32 (c)(3)(D)?

II.

WHETHER THE CASE LAW FROM THE SEVERAL CIRCUITS MANDATE THAT WRITTEN OBJECTIONS FILED BY THE DEFENDANT PRIOR TO SENTENCING TRIGGER THE FINDING REQUIREMENTS OF RULE 32 (c)(3)(D)?

III.

WHETHER IT IS NECESSARY TO INTERPRET RULE 32 AS BEING TRIGGERED BY WRITTEN OBJECTIONS PRIOR TO SENTENCING IN ORDER TO AVOID AN ABSURD RESULT?

IV.

WHETHER THE PETITIONER, IN THE INSTANT CASE, WAIVED HIS WRITTEN OBJECTIONS THAT WERE MADE PRIOR TO SENTENCING; OR WERE THESE OBJECTIONS

WAIVED BY COUNSEL; OR DID THE DISTRICT COURT MAKE SPECIFIC FINDINGS OF FACT AS REQUIRED BY RULE 32; OR WERE THESE OBJECTIONS NOT FACTUALLY ORIENTED AND THEREFORE, DID NOT TRIGGER THE FINDING REQUIREMENTS OF RULE 32?

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STANLEY E. ADAMS
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UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Petitioner, Stanley E. Adams, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 13, 1993, and Petition for Rehearing denied October 15, 1993.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit entered on September 13, 1993 under the caption *United States v. Adams* was not printed due to local Rule 47.6. That determination is attached hereto in Appendix 1. Petition for rehearing was denied (Appendix 1A).

JURISDICTION

The judgement of the United States Court of appeals for the Fifth Circuit was entered on September 13, 1993. A petition for rehearing was sought and denied on October 15, 1993. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without Due Process of law*; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On August 7, 1990, the Defendant was named in a fourteen count indictment in the Western District of Texas. The Defendant, pursuant to a plea agreement, plead guilty to Count I, conspiracy to violate 18 U.S.C § 371 and Count X, violation of 18 U.S.C. §1006 on November 14, 1991. The remaining counts were dismissed pursuant to the plea agreement.

The Defendant raised several written objections to matters controverted in his pre-sentence investigation report (PSI). The Defendant's objections included several factually specific and important questions as to the accuracy of the allegations made in his PSI. These objections were filed in a "Motion to Correct Presentence Investigation Report" filed with the District Court on February 14, 1992. (Appendix 2). On February 20, 1992, sentencing was held in the United States District Court for the Western District of Texas before the Honorable James R. Nowlin.

At sentencing, the Defendant was represented by counsel. Counsel began the sentencing hearing by affirming that

the District Court had received a copy of the Defendant's written objections to the PSI. Counsel stated:

> MR. HAYNES: If the Court please, *we filed a written motion to correct the presentence investigation report under Rule 32 (c)(3)(D)*. And--but I-- and its a multi page, and it was filed I think yesterday.
>
> THE COURT: I've read it.
>
> MR. HAYNES: --if the court please. I don't know if it will assist the court for me to reread it, *but I would like to highlight some points...*
>
> THE COURT: All right. Go ahead.
>
> MR. HAYNES: *To supplement our position*, if the court please, I would like to offer for the court's consideration and as evidence in these sentencing proceedings what I've marked as Defendant's exhibits 6 and 7....(Appendix 3, Sentencing Transcript, pp. 3-4)

In addition, when the Court inquired as to whether or not the Defendant had any objections, the Defendant personally stated that he did in fact have several objections and that he believed the court had been made aware of these objections through the filing of the Motion to Correct the PSI. The Defendant stated:

> MR. ADAMS: There's quite a few things in it we don't agree with. *We have, I think, listed about sixty something*. They basically relate to the breadth the government has chosen to carry the conspiracy argument and the-- my involvement in trying to tie me into cases that I didn't plea to and assessing dollar figures there that we don't agree with.

> And that's the substance of our objection. And other than– I will say that their version of the facts is considerably different than our recollection. And since we didn't have a trial, certain aspects of those things never came out....(Appendix 3, S.T., pp. 2-3)

At sentencing, Mr. Haynes orally argued to remove the loss assessment statement concerning the DeSoto properties transactions (App. 3, pp. 6-8), the losses by Lamar Savings on the Parklane, Witte, DeSoto, and Poderosa properties (App. 3, p 11), and finally, counsel orally argued that (a) there were no losses and (b) if the Court found there were losses the Defendant should not be held responsible for amounts allegedly lost in transactions involving his codefendants and others which did not end in net losses to Lamar Savings. (App. 3, pp. 11-12, 14-16). These arguments resulted in the Court removing over $9,000,000 from the Defendant's Victim Impact portion of his PSI (App. 3, p. 19) and an order that the Defendant not be required to pay restitution (App. 3, p. 8). The Court refused to remove the $78,500 loss from the Remington House Apartments (pg. 7 of the PSI) transaction from the Defendant's PSI. (App. 3, p. 19).

After the above determinations, Judge Nowlin inquired as to any reason why sentence should not be passed. All parties answered in the negative. (App. 3, p. 26). The District Court then sentenced the Defendant to Four (4) years on Count I and four (4) years on Count X, concurrently, and a fine of $250,000. in addition, the Court ordered the Defendant to complete 500

hours of community service upon release. (App. 3, p. 28).

On March 13, 1992, the Defendant filed a Motion for Clarification of Rule 32 Motion. (Appendix 4). The Government responded (Appendix 5) and the Defendant replied to the Government response. (Appendix 6). The Defendant argued in his Motion for Clarification that the Court should rule on the several factors not addressed at sentencing and correct the matters that were ruled in the Defendant's favor at sentencing in the PSI. The District Court denied this Motion on April 16, 1992. (Appendix 7).

On April 24, 1992, Counsel for the Defendant supplemented his request for clarification on the Rule 32 Motion. (Appendix 8). Again, counsel argued that the matters controverted by the Defendant should be ruled upon due to the significant impact that the PSI would have on future dispositions such as supervised release hearings. On April 24, 1992, the District Court ordered that the appropriate correction be made to the Defendant's PSI in accord with the findings made on February 20, 1992 at the sentencing hearing. (Appendix 9). The District Court still refused to make any findings concerning any of the matters controverted by the Defendant in his written objections filed February 14, 1992.

The Defendant appealed his decision to the United States Court of Appeals for the Fifth Circuit on August 28, 1992. The Defendant raised two (2) issues on direct appeal:

1) Whether the District Court erred by not addressing the written objections made by the Defendant pursuant to Rule 32?

2) Whether the District Court erred in not attaching a written addendum to the Defendant's PSI to clarify the findings of fact made in regard to objections raised by the Defendant?

The Fifth Circuit Court of Appeals denied the Defendant's appeal, *per curiam*, on September 13, 1993. The Court did not print the decision pursuant to local Rule 47.5.

On September 23, 1993, the Defendant filed a Petition for rehearing *en banc* with the Fifth Circuit Court of Appeals. The Defendant argued one (1) issue:

1) Whether the written objections made by counsel before the sentencing hearing triggered the requirements of Rule 32 and counsel's conduct did not waive these objections?

The Fifth Circuit denied rehearing *en banc* on October 15, 1993. As a result of denying the petition for rehearing *en banc*, there is no published record as to why the District Court and the Fifth Circuit Court of Appeals decided that the Defendant had not triggered the Rule 32 requirements that every disputed sentencing matter either be decided to be true or deemed irrelevant to sentencing.

REASONS FOR GRANTING THE WRIT

The Several Circuits have agreed on the purposes, the evidentiary standards, and the requirements of Federal Rule of Criminal Procedure 32 (c)(3)(D). The Fifth Circuit has generally agreed with its sister Circuits on these three issues. However, in the instant case, the Fifth Circuit, by allowing the District Court to refuse to rule on several written objections made by the Petitioner prior to sentencing, has made a clear and erroneous break from the other Circuits. The case law clearly demonstrates that the several Circuits view written objections filed by defendants before sentencing as triggering the Due Process protections of Rule 32 (c)(3)(D). Despite this well settled point of law, the Fifth Circuit seems to take the opinion that no such protection is afforded written objections.

In the instant case, the Court of Appeals for the Fifth Circuit allowed a District Court to escape its duties under Rule 32 to either (i) make a finding of fact or (ii) determine that the factor will not be used at sentencing. By affirming the District Court's course of action, the Fifth Circuit held that written objections do not trigger the finding requirements of Rule 32. This holding would be in opposition to several Circuits' holdings that written objections do in fact provide the necessary notice to the Court that the defendant has found a problem within his PSI.

There are several reasons that the Fifth Circuits' position concerning this issue is untenable. First, the plain meaning of

the statute clearly indicates that written objections satisfy the requirement that the defendant alert the Court of any errors in his PSI. Second, the case law of the several Circuits' indicates that judicial interpretations of the aforementioned plain meaning clearly accept written objections as triggering Rule 32. Finally, an absurd result occurs when written objections are viewed as not triggering Rule 32. By allowing District Courts the discretion to just ignore written objections, one of the most important Due Process safeguards is removed. In effect, each defendant could be sentenced on the basis of materially untrue information which is clearly prohibited by the constitution and such cases as *Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed.2d 1690 (1948) and *United States v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 853 (1972).

I. The Plain Meaning of Rule 32 (c)(3)(D) Clearly Demonstrates That Written Objections Filed Before Sentencing Trigger The Finding Requirements of Rule 32 (c)(3)(D).

First, the plain meaning of the statute clearly indicates that written or oral objections can trigger the District Court's duties under Rule 32. Rule 32 (c)(3)(D) states:

> If the comments of the defendant and the defendant's counsel or testimony or *other information* introduced by them allege *any* factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court *shall*, as to *each* matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because

> the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons. (Emphasis added) F.R.Cm.P., Rule 32 (c)(3)(D) (1992).

The language of the statute is clearly mandatory. The statute states that the Court "shall" make one of the mandatory findings. In short, the Rule 32 finding to be made when a defendant objects to any portion of the PSI is not within the discretion of the district court, but instead is one of the obligations of the district court.

Moreover, in reference to what triggers these mandatory findings, Congress chose the term "any factual inaccuracy". Clearly this broad language was chosen to facilitate a range a ways that a defendant may object to his PSI. Under this broad language, written and oral objections may trigger the requirements of Rule 32. The key factor under Rule 32 is that the defendant alert the Court of specific, factual challenges he has to his PSI. As the Eighth Circuit stated in *United States v. Bartsh*, 985 F.2d 930, 933 (8th Cir. 1993), Rule 32 requires the defendant to alert the Court of his complaints. Once the defendant has alerted the Court, the prosecution must satisfy its burden of proof.

Finally, the fact that Congress chose to use the terms "the comments of the defendant..." , "testimony", and "other information introduced" to describe what sort mechanisms trigger

Rule 32 demonstrates Congress' intent to broadly define the types of words or actions by defendants that would trigger Rule 32. In fact, written objections could be considered to fall under "comments", "testimony", or "other information". The written objections are filed with the Court and therefore, must be considered under the definition of "other information" used by Congress in drafting Rule 32. The motion to file written objections is accompanied by an affidavit signed by the defendant and could therefore, be considered testimony. Finally, written objections could easily be construed as comments by the defendant. Therefore, the broad language chosen by Congress lends itself to the conclusion that Congress intended written objections to trigger Rule 32.

In addition to the broad and mandatory language of Rule 32 itself, references to Rule 32 also demonstrate that the plain meaning of Rule 32 allows written objections to trigger the finding requirements. Section 6A1.3(b) of the United States Federal Sentencing Guidelines states:

> The Court shall resolve disputed sentencing factors in accordance with Rule 32 (a)(1), Fed. R. Crim. P., notify the parties of its tentative findings and provide reasonable opportunity for the submission of oral *or written objections* before imposition of sentence. (Emphasis Added) Federal Sentencing Guideline Manual, §6A1.3(b), p. 338 (1992).

Clearly this policy statement issued by Congress purports to allow written objections to trigger Rule 32. In fact, this

statement by Congress seems to state no preference for oral or written objections. Congress has treated these types of objections as equals.

Therefore, the plain language of the statute, and the language of other statutes which reference back to Rule 32, clearly demonstrate that written objections suffice to trigger the finding requirements under Rule 32 (c)(3)(D). Congress drafted Rule 32 in such a manner that written objections clearly fall within the prescribed methods for alerting the sentencing court of errors. Moreover, once the court is alerted, its duty to make the proper findings under Rule 32 (c)(3)(D) is triggered.

II. The Case Law From The Several Circuits, Including The Court of Appeals For The Fifth Circuit, Clearly Indicates That Written Objections Made Prior to Sentencing Trigger The Finding Requirements of Rule 32 (c)(3)(D).

The Several Circuits have faced the issue of whether or not the filing of written objections before sentencing stands to sufficiently put the Court on notice of its duties under Rule 32. The resounding answer has been yes.

The several Circuits have agreed that written objections filed with the Court before sentencing do trigger Rule 32 requirements. *See United States v. Edgecomb*, 910 F.2d 1309, 1313 (6th Cir. 1990); *United States v. Montayne*, 996 F.2d 190, 192 (8th Cir. 1993) (written objections made before sentencing triggered prosecution's burden to prove sentencing factor by a

preponderance of the evidence); *United States v. Jones*, 1992 U.S. App. LEXIS 20[illegible] (9th Cir. 1992) (District Court made Rule 32 findings in reaction to written objections filed before sentencing); *United States v. Juarez*, 1F.3d 1250 (10th Cir. 1993) (District Court made expressed Rule 32 findings on written objections); and *United States v. Caraza*, 843 F.2d 432, 437 (11th Cir. 1988) (District Court made Rule 32 findings as to matters raised at sentencing hearing and matters raised in pre-trial motion).

In *Caraza*, the Court stated that it did not have to make findings on written objections not because they were not brought up at oral argument, but because the objections themselves did not question any fact of the case. *Id.* at 437. Similarly, the Ninth Circuit case of *United States v. Jones*, 1992 U.S. App. LEXIS 20798 (9th Cir. 1992) held that written objections triggered Rule 32 findings. In that case, the District Court made Rule 32 findings immediately upon presentation of written objections filed by the defendant. *Id.* at 3. Clearly, the Ninth Circuit does not require that written objections be made again at sentencing during oral argument in order to warrant the triggering of Rule 32.

Moreover, the Fifth Circuit has at least implicitly held that written objections trigger Rule 32 findings. *See United States v. Ramirez*, 963 F.2d 693, 706 (5th Cir. 1992) (Court only stated that defendant made written objections, no mention oral

argument). This year, in *United States v. Stouffer*, 986 F.2d 916, 927 (5th Cir. 1993), the Fifth Circuit expressly ruled on written objections that were denied by the District Court.

In the instant case, the Fifth Circuit has departed from this standard. In this case, the Fifth Circuit has allowed the District Court to skirt its duties under Rule 32 by not requiring any finding of fact concerning the several written objections that were not discussed orally at the sentencing hearing. This deviation sets a dangerous precedent and is clearly erroneous in light of the several Fifth Circuit cases which hold to the proposition that written objections trigger Rule 32. Moreover, this change in its reading of Rule 32 by the Fifth Circuit clearly is in opposition to the several other Circuits which have held that written objections trigger Rule 32.

First, the plain meaning of the statute clearly demonstrates that written objections trigger Rule 32 findings. The Several Circuits agree on this point. The Fifth Circuit's interpretation of Rule 32 is repugnant to Congress' intent as expressed by the broad and mandatory language used in the drafting of Rule 32. As already discussed, written objections may legitimately be considered "comments". "testimony", or "other information" under Rule 32 (c)(3)(D). Likewise, statutes which reference themselves to Rule 32 clearly indicate that written or oral objections suffice to trigger the requirements of the Rule.

Next, the Fifth Circuit's interpretation that written objections do not trigger mandatory findings under Rule 32 (c)(3)(D) is contradictory not only to the several other Circuit's decisions concerning Rule 32, but is also contradictory to the Fifth Circuit's own interpretations of Rule 32.

Clearly the facts of this case establish that the Defendant placed the District Court on notice of the fact that there were errors in his PSI. As the Eighth Circuit stated in *Bartsh*, the defendant only needs to alert the District Court of errors in the PSI in order to trigger Rule 32. *United States v. Bartsh*, 985 F.2d 930, 933 (8th Cir. 1993).

The Defendant sufficiently alerted the District Court of the inaccuracies contained in his PSI by filing written objections on February 14, 1992.

The Defendant filed factually specific objections to the PSI almost one week before sentencing. These objections (Appendix 2) stated specific grounds and factual allegations as to the inaccuracy of the Defendant's PSI. The Defendant alleged that amounts within his Victim Impact statement were incorrect, he alleged that the report used the term "sham loans" improperly. he alleged the report was inaccurate in calculating the interest lost from deals that he explicitly had nothing to do with, he objected to an amount of money that the PSI claimed he was given by a coconspirator, and he objected to several basic characterizations of himself in the PSI. In all, the Defendant

filed sixty-three written objections to the Presentence Investigation Report prior to sentencing. A careful review of these objections reveals that they were specific and factually related.

Under the Fifth Circuit's interpretation of Rule 32, the Defendant's failure to argue these objections again at sentencing constituted waiver of these objections. Therefore, under the Fifth Circuit's analysis, the District Court never was forced under Rule 32 to make specific findings. This interpretation is contradictory to the manner in which the Eleventh Circuit dealt with the problem in *United States v. Carraza*, 843 F.2d 432 (11th Cir. 1988). It is clear that Eleventh Circuit has held that written objections trigger Rule 32 and failure to readdress the specific objections at sentencing is immaterial. The requirements of Rule 32 must still be met by the sentencing court. Similarly, the Ninth Circuit case of *United States v. Jones*, 1992 U.S. App. LEXIS 20798 (9th Cir. 1992) cannot be harmonized with the Fifth Circuit's decision in the instant case.

Moreover, the Fifth Circuit's determination in the instant case cannot be harmonized with its own opinions and analysis in several other cases. For example, in *United States v. Ramirez*, 963 F.2d 693, 927 (5th Cir. 1992), the Fifth Circuit opinion states only that the defendant made written objections. Under this new interpretation of Rule 32, no Rule 32 issue could have even been raised on appeal if the defendant only filed written

objections. Under the Fifth Circuit's new interpretation of Rule 32, the District Court's duty to make findings would have never been triggered. These two results seem antithical. In *Ramirez*, the Fifth Circuit says that only written objections were filed. but Rule 32 was triggered, but in the instant case, the Fifth Circuit says that written objections alone do not trigger Rule 32. Clearly these positions cannot be harmonized.

Perhaps even more demonstrative of how the Fifth Circuit's determination in the instant case cannot be harmonized with its previous holdings is the recent case of *United States v. Nnanna*, 7F.3d 420 (5th Cir. 1993). In *Nnanna*, the District Court explicitly overruled several objections that were made in writing before sentencing. The Fifth Circuit decided that the District Court's handling of the written objections was adequate. *Id.* If the Fifth Circuit really held that written objections did not trigger Rule 32, then there would have been no issue for the Court of Appeals in *Nnanna* to address. The Fifth Circuit's decision in *Nnanna* demonstrates a division not only between the Fifth Circuit and its sister Circuits, but also a division internally relating to what the Fifth Circuit views as the proper law.

Therefore, the Fifth Circuit's disposition of the instant case is clearly at odds with not only the law of the several other Circuits, but is also at odds with the law within the Fifth Circuit. The other Circuits clearly require Rule 32 findings when a defendant makes written objections that relate to some factual

determination concerning the defendant's PSI. Moreover, it is clear that the previous decisions of the Fifth Circuit held to much the same rule concerning Rule 32 triggering.

In the instant case, the Fifth Circuit abandoned this rule and allowed the District Court not to make findings that were clearly required under Rule 32. Moreover, in subsequent cases, like *Nnanna*, the Fifth Circuit seemed to recognize an issue of law concerning Rule 32 requirements and written objections. The Fifth Circuit recognized that written objections trigger Rule 32. Therefore, it appears that the Fifth Circuit's disposition of this case is at odds not only with previous decisions of the several circuits, including the Fifth Circuit, but is also at odds with subsequent decisions made by the Fifth Circuit.

In conclusion, the plain language of Rule 32 clearly mandates an approach like the one adopted by the Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits in which written objections trigger Rule 32 finding requirements. The Fifth Circuit itself has recognized this as being the correct choice both before and after the decision in the instant case.

III. The Fifth Circuit's Position That Written Objections Do Not Trigger Rule 32 Findings Leads To The Absurd Result That Defendants Could Be Sentenced on The Basis of Materially Untrue Information

Finally, the Fifth Circuit's determination in this case that written objections did not trigger findings under Rule 32 leads to

the absurd result that defendants may be sentenced on the basis of materially untrue information.

The result that defendants may be sentenced on the basis of materially untrue information can be illustrated by the Fifth Circuit case of *United States v. Charroux*, 3 F.3d 827 (5th Cir. 1993). The circumstances in *Charroux* are somewhat similar to those in the instant case. First, counsel in *Charroux* chose to file several written objections and then raised further, different objections at sentencing. *Id.* at 835. The District Court stated that it intended to overrule all the objections attached to the PSR (i.e. the written objections). *Id.* The Fifth Circuit declared that the District Court's handling of the written objections in the *Charroux* case was indeed acceptable under the Fifth Circuit's interpretation of Rule 32. *Id.*

Applying the law used in the instant case to the facts of *Charroux*, the District Court would not have to make any determination concerning the written objections. As such, counsel's choice to raise different objections at oral argument would render the written objections either waived or ineffectual. In either case, applying the law of the instant case, the written objections, since they were not reiterated at sentencing, did not trigger Rule 32. Despite the truthfulness, the accuracy, or the basis in fact of the matters controverted by the defendant, under the analysis of the Fifth Circuit in the instant case, these written objections could be accepted and used by the District Court

without any findings as to their accuracy or truthfulness.

Under the law as explained in the instant case, the defendant would lose his due process right to be sentenced on materially true information when his counsel alerted the Court as to errors in the PSI and then argued these errors before sentencing in the form of a written motion. All the due process protections of Rule 32 would then hinge on oral argument. This result is absurd and flies in the face of the purpose of Rule 32 and the plain meaning of the drafters of the Rule.

IV. The Defendant's Objections Were Clear And Factually Oriented and Were Not Waived By Counsel Or The Defendant As Alleged by The Prosecution.

The Fifth Circuit published only a one word opinion in response to the Defendant's request that the Court of Appeals order the District Court to make sufficient findings of fact concerning the Defendant's written objections. In response to this request, the government filed an appellee's brief which argued: 1) That the Petitioner's counsel waived the written objections at sentencing, 2) that the Defendant Himself waived the Objections at Sentencing, 3) That the District Court made Clear Findings of Fact as required by Rule 32, and 4) That the Petitioner's objections were not factually related.

The Petitioner can demonstrate that none of these alternative reasons are viable arguments for the District Court's

refusal to make findings of fact in accord with Rule 32 (c)(3)(D).

A. **The District Court Did Not Make Clear Findings of Fact Concerning All The Controverted Matters In The PSI.**

The government first argues that the Court did in fact make clear findings as required by Rule 32.

The Sentencing transcript (Appendix 3) makes it clear that the District Court did not make findings concerning all the objections made by counsel. The record clearly reflects that the Court only addressed those issues that the Defendant's counsel orally argued before the Court. The three issues which were argued by counsel were ruled upon by the District Court. However, there still remained some thirteen (13) objections as to the contents of the PSI.

Moreover, in response to defense counsel's motion to clarify the Rule 32 findings (Appendix 8) the District Court ordered that the corrections discussed orally on February 20, 1992 in open Court should be made to the Defendant's PSI. However, the Court noted at the same time it would not make any determinations concerning the written objections that were not discussed in Court at sentencing. (Appendix 9).

Therefore, it is clear that the District Court did not make any findings concerning the written objections that were raised before sentencing in the Defendant's Motion to Correct PreSentence Investigation Report.

B. **The Defendant's Counsel Did Not Waive The Written Objections Which He Did Not Orally Argue Before The Court.**

The government next contends that defense counsel waived the objections contained in the written motion to correct the PSI when he failed to argue some of the objections orally before the Court.

The government cited several cases which purportedly supported this contention that somehow an attorney could implicitly waive objections which he had filed written notice of before sentencing. The government points to the fact that defense counsel was not interrupted nor "cut off" from continuing his objections. *United States v. Velasquez*, 868 F.2d 714, 715 (5th Cir. 1989). Although a Court would be forced to resentence if the Judge decided that he had not heard enough and wanted to continue, this point has very little to do with the requirements that were triggered by Rule 32.

The government also argued the case of *United States v. Hatchett*, 923 F.2d 369 (5th Cir. 1991). In *Hatchett*, however, the District Court complied with Rule 32 by attaching an addendum to the defendant's PST explaining to all subsequent readers how the court had made its determinations regarding sentencing. *Id.* at 376.

The instant case is clearly different from *Hatchett*. In this case, there is no written record whatsoever concerning the District Court's determinations concerning the written objections

made by the Defendant through counsel prior to sentencing. Unlike the defendant in *Hatchett*, the Defendant in the instant case has no written explanation accompanying his PSI to subsequent readers. Therefore, one of the two main purposes of Rule 32 is frustrated by the government's contention that the failure on the part of defense counsel to orally urge his written objections constitutes an implicit waiver.

Moreover, in the instant case, defense counsel clearly did not explicitly waive the objections. At sentencing, the counsel premised his remarks by assuring himself that the District Court was familiar with his objections. After determining that the Court was familiar with the objections filed on February 14, 1992, counsel proceeded to proportion his time to the areas that he felt most important, namely the larger dollar amounts that were incorrectly allowed to be entered into the defendant's PSI. Counsel explicitly stated that he was supplementing, not changing, his position in regard to the previously admitted written objections. Clearly, defense counsel did not explicitly waive his written objections that were not argued at sentencing.

The instant case is analogous to the Sixth Circuit case of *Edgecomb*, *supra*. In *Edgecomb*, the Court found that even though defense counsel was addressed directly by the court and stated that he had no further objections, the Court was not relieved of its duty to make clear findings and determinations under Rule 32. *Edgecomb*, 910 F.2d 1309, 1314. This case

offers a similar set of operative facts. Although counsel did later state he had nothing further to present, the District Courts obligations under Rule 32 had already been established.

Similarly, in the instant case, the Court's duty under Rule 32 was not waived by defense counsel when the Court asked counsel if he had anything further to argue. The record for this case is complete with written objections that the Court was aware of and failed to rule upon at sentencing. Moreover, the Fifth Circuit Court of Appeals, by failing to properly resolve this issue and furthermore, by failing to even publish an opinion, allowed the requirements of Rule 32, and the protections afforded defendants by adherence to this Rule, to be thrown by the wayside. The Fifth Circuit, by condoning the action of the District Court, compromised the Defendant's Due Process rights to be sentenced on the basis of materially true information.

C. The Defendant Clearly Did Not Waive The Written Objections That Were Filed By Counsel Prior To The Sentencing Hearing.

The government next contended that the Defendant himself had personally waived the written objections to the PSI that were filed prior to sentencing.

The government position that Defendant Adams waived his previous objections is without merit. When defendant Adams was addressed by the Court, he unequivocally stated his position. Mr. Adams stated that he was under the impression

that written objections had been filed and that these objections were the basis of his argument. (Appendix 3, pp. 2-3). At no time during this discussion with the Court did Mr. Adams state that he intended to waive or remove his written objections from the record. In fact, Mr. Adams never explicitly stated that the three main objections that were orally argued by counsel were the basis of his argument. Mr. Adams did explicitly state that the **written** objections were his argument, not the oral argument objections which were only a fraction of all the objections raised by counsel.

Therefore, nowhere in the record can the government point to a statement by Mr. Adams that constitutes waiver of his written objections. In fact, the comments of the District Court continually lead counsel and Mr. Adams to believe that their written objections would be ruled upon as clearly required by Rule 32 (c)(3)(D).

D. The Defendant's Written Objections Were Specific And Clear And Therefore Should Have Been Afforded The Protections And Procedural Safeguards Of Rule 32 (c)(3)(D).

Finally, the government contended that the Defendant's written objections lacked specificity, went to tone of the PSI, and were not supported by rebuttal evidence.

The law regarding the evidentiary standard is clear. As stated above, the several Circuits, including the Fifth Circuit, agree that once the defendant has raised specific allegations of

inaccuracy, the Court must prove the truth of said statements by a preponderance of the evidence. *See United States v. Billingsley*, 978 F.2d 861, 866 (5th Cir. 1992). This point of law is well settled.

The government contended, in its brief, that the burden of proof is immediately placed upon the defendant to disprove the contested matters. *United States v. Rodriguez*, 897 F.2d 1324, 1327 (5th Cir. 1990), *cert. den.* __ U.S. __, 111 S.Ct. 158 (1990). The government's reliance on this case is completely unfounded. In *Rodriguez*, the government had already provided the Court with evidence validating the truth of a remark in the defendant's PSI. To hold the government reading of *Rodriguez* would be to allow the government to place blatantly unfounded allegations into the PSI and then force the defendant to disprove these lies. This is not what *Rodriguez* says or implies.

Moreover, the government cannot contend that the information contained in the PSI established the government's burden and then shifted the burden to disprove the assertion onto the Defendant. *United States v. Wise*, 976 F.2d 393, 404 (8th Cir. 1992) *cert. den.* __U.S.__ ,113 S.Ct. 1592, 123 L.Ed.2d 157 (1993). The Fifth Circuit has explicitly stated that facts in the PSI, that are controverted, cannot serve as the sole basis for a sentencing decision. *United States v. Patterson*, 962 F.2d 409, 414-15 (5th Cir. 1992).

Clearly, the initial burden is on the government once a

sentencing factor is disputed. In the instant case, the government did not meet its burden. There was no discussion of the several written objections and the Court asked no questions nor made any determinations concerning these matters.

Next, the government contended that the Defendant's objections lacked merit because they were objections related to the tone of the PSI

This argument is also without merit. The objections made before sentencing deal with a variety of issues. Several of the objections concern alleged amounts that were included in the Defendant's Victim impact Statement. Since this section of the report helps to decide the Base Offense Level, then surely the government's contention that the Defendant's objections relate strictly to tone are untenable.

Moreover, the Defendant objected to several amounts that were included in his PSI regarding restitution amounts. And the attempts by the government to broaden the charges which the Defendant had pled guilty beyond those as set forth in the plea agreement. The Fifth Circuit explicitly held that the District Court must determine any restitutionary amounts that are disputed. *United States v. Cockerham*, 919 F.2d 286, 288 (5th Cir. 1990). Clearly, these objections must be subjected to Rule 32 findings under the Fifth Circuit's holding in *Cockerham*.

Finally, the government contended that the Defendant's allegations of error in the PSI were not specific enough to trigger

Rule 32.

The Fifth Circuit, like several other Circuits, has held that in order to trigger Rule 32 a defendant's allegations of error must be specific and involve questions of fact, not conclusions. *United States v. Hurtado*, 846 F.2d 995, 998 (5th Cir. 1988). In short, the defendant may not trigger Rule 32 by generally objecting to the PSI.

In the instant case, the Defendant clearly made specific allegations concerning inaccuracies. The rule in *Hurtado* should only be applied to keep defendant's from abusing the system and unnecessarily delaying the passing of sentence. In the instant case, the Defendant made extremely specific allegations. He only desired to invoke his constitutional right of due process. However, by failing to make specific findings on the specific allegations made by the Defendant, he was denied this right.

CONCLUSION

The Defendant in the instant case has been denied the protections of Rule 32 (c)(3)(D) by the District Court's failure to make specific findings of fact concerning written objections made by the Defendant before sentencing. The Defendant's due process rights have further been infringed by the Fifth Circuit's refusal to order the District Court to make the required findings under Rule 32.

The Court of Appeals for the Fifth Circuit apparently held in this case that written objections made prior to sentencing did not trigger the finding requirements of Rule 32 (c)(3)(D). This position not only is repugnant to the plain meaning of the statute, it also flies in the face of the judicial interpretations concerning Rule 32 made by the several Circuits, including the Fifth Circuit both before and after its determination in this case. Finally, such a decision impermissibly restricts the protections put in place by Congress through its enactment of Rule 32.

Moreover, the reasons given by the prosecution, which we must believe made the basis for the Fifth Circuit's opinion, for the District Court being relieved of any duty to make factual findings are untenable. There is no evidence that the Defendant nor his Counsel at any time intended to waive the written objections made before sentencing. In fact, the statements of counsel prove that he viewed oral argument as a supplement to, not a replacement for written objections.

Therefore, the facts of this case demonstrate a developing split among the several Circuits concerning what is necessary to trigger the findings required under Rule 32. It is clear that the plain meaning and the purposes of Rule 32 are better served by the overwhelming majority of Circuits who hold that written objections trigger Rule 32 finding requirements the same as oral objections trigger such findings.

Wherefore the Petitioner, Stanley E. Adams, Jr. respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit.